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RECIPROCAL SERVITUDES OR EASEMENTS.

The question whether when a servitude is acquired by prescription in favor of land, as a charge upon other land, a reciprocal right is acquired in favor of the servient tenement to a continued exercise of the servitude, has been often discussed in courts of law, but seems never to have been finally decided.

That the dominant tenement may be charged by express grant with the reciprocal servitude as the consideration of the servitude imposed on the servient tenement—the land and not the person being subjected to the charge—seems to be very clear.

If a person covenants that in consideration that he is permitted to flow his neighbor's land with water, he will for ever maintain the dam on his own land by which the overflow is effected, so as to form an icefield; he not only charges himself personally with the obligation, but a reciprocal servitude is constituted which charges the dominant tenement and may pass as appurtenant to it. Is such a reciprocal servitude implied from the exercise of the principal right during the time of limitation?

The foundation of a prescriptive servitude is adverse possession; but adverse possession does not always imply a wrongful com-

mencement. A possession which commences under a license if enjoyed as of right, is adverse.

When two proprietors build houses each on his own land, but under the same common roof, and with a common support, each has a servitude of support against the other. The reciprocal servitude in this case depends upon a mutual license; but the possession is of right and adverse. The mutual advantage is the consideration of the express and implied license. As soon as the license is executed, the right to the servitude of support exists; *a fortiori* is the right absolute after an enjoyment during the time of limitation. In the case supposed, the advantage is mutual and immediate, and the reciprocal servitudes are the consideration each of the other; but a case may be stated where there is no such immediate advantage to the servient tenement, and yet a reciprocal servitude clearly exists. If A. builds the wall of his house partly on his own land and partly on the land of B., the latter would, after twenty years, acquire a right to have the wall maintained as a support for a house to be subsequently erected.

The foundation of a reciprocal servitude is a presumed grant, and in general an adverse possession is the necessary basis of such a grant. If a proprietor erects a dam on a stream upon his own land, and thus sets the water back upon the land of a proprietor above, he furnishes him with a right of action, and by an adverse user for twenty years, acquires a right to maintain the dam; but what is the foundation on which the right of the upper proprietor to have the overflow which has existed by means of the dam continued for his benefit? His enjoyment of the water for twenty years has never given any cause of action to the proprietor of the dam. His user may have been as of right, but it has not been adverse in the sense that an action might have been sustained against him. Admitting that the advantages derived from the flow of water may have been the reason for the acquiescence of the owner of the servient land in the charge upon his land, it may be asked, what right has he acquired to have it continued? Although a wrongful adverse possession is generally the foundation of a presumed grant, it is not its only support.

A mutual advantage may be the consideration for an agreement to impose reciprocal charges. A man may be presumed to have granted the servitude *imittendi tigni*, in consideration of the support which the timber yields to the servient tenement. When a party-wall is erected so as to stand upon the land of two adjoining proprietors, there is a presumed agreement on the part of each proprietor to maintain that portion of the wall standing on his own land. The presumption results from the mutuality of the consideration. So if a man erects a dam and a tide mill, partly on his own land and partly on the land of his neighbor, who uses the water for propelling machinery, the acquiescence of the owner of the servient land in the use thus made of his premises, may be a consideration for a charge upon the owner of the dominant tenement, to submit to the maintenance of the dam in part upon his own land.

It would seem that the agreement in such a case is to be presumed as a fact, and is not a conclusion of law such as results from an adverse enjoyment which gives a cause of action. When an adjoining proprietor derives an advantage which corresponds with that of the encroaching party, from the acts which trench upon his property, a strong presumption exists that such advantage was the inducement for his acquiescence, and that there was an agreement for mutual servitudes; but the presumption in such cases is not absolute, like the presumption of law which exists where a cause of action exists on an adverse possession. The presumption is one of fact only within the discretion of the triers. If a man builds a house so that the water falls from the eaves upon his neighbor's land, he may acquire an absolute right to the overhanging eaves, after an enjoyment of twenty years; but his neighbor does not acquire an absolute right to have the house maintained for the purpose of supplying water from the roof. If the owner of the servient tenement derives some advantage from the flow of water from the eaves, it is so disproportioned to the burden which would be imposed by the constitution of reciprocal servitudes, that as a presumption of fact it would be absurd to suppose their existence.

It appears, from the following passage in the Digest of Justinian, that when a work has existed on land of a proprietor, from which a neighbor's land derived advantage, a servitude resulted from long enjoyment, in favor of the land benefited by the work: D. 39, 3, 2, 5. "Item Varus ait, Aggerem, qui in fundo vicini erat, vis aquæ dejecit: per quod effectum est, ut aqua pluvia mihi noceret. Varus ait, Si naturalis agger fuit non posse me vicinum cogere aquæ pluviæ arcendæ actione, ut eum reponat vel reponi sinat. Idemque putat, et si manufactus fuit, neque memoria ejus exstaret: quod si exstet, putat aquæ pluviæ arcendæ actione eum teneri. Labeo autem, si manufactus sit agger, etiamsi memoria ejus non exstat, agi posse, ut reponatur: nam hac actione neminem cogi posse, ut vicino prosit, sed ne noceat aut interpellet facientem quod jure facere possit. Quamquam tamen deficiat aquæ pluviæ arcendæ actio: attamen opinor *utilem actionem* vel interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro ejus, qui factus mihi quidem prodesse potest, ipsi vero nihil nociturus est; hæc æquitas suggerit, etsi jure deficiamur." (Varus supposes that an embankment on the land of a neighbor has been carried away by a flood, in consequence of which I sustain damage from the discharge of rain water. Varus says that if the embankment was a natural one, I cannot, by the action *aquæ pluviæ arcendæ*, compel my neighbor to restore it, or suffer it to be restored, and he thinks that the same is true if the embankment is artificial, if the fact that it is so cannot be shown: but if it can be shown to be artificial, the action *aquæ pluviæ arcendæ* may be sustained against him. But Labeo is of opinion that if the embankment is artificial, though (having existed immemorially) no evidence of the fact exists, the action for its restoration may be sustained. For by this action one cannot be constrained to do something for the profit of his neighbor, but to avoid doing him an injury, or preventing what he may lawfully perform. But, even if he is not entitled to the action, still I am of opinion, says Paul, that the *actio utilis* is competent against a neighbor, or an interdict, if I desire to restore the embankment on his land, which, when restored, will benefit me, and not be injurious to him. This equity suggests,

even if the legal remedy fails.) It appears that if in this case the embankment had been a natural one, the action could not have been sustained, because it is evident the right to have the embankment maintained depended upon the existence of a servitude created by grant or prescription. The circumstance that it could not be shown when the right commenced, Labeo supposes was not material, if the work was really an artificial one. It does not seem to have been at all material, whether the embankment was constructed by the owner of the land where it existed, or by the owner of the land protected by it. A right to the mound as a servitude existed, if the work was an artificial one, because created under a grant express or presumed. If the protection had depended upon a natural bank, no agreement could have been implied, and the rights of the parties would have been different.

It is evident, from the case supposed, that the artificial work was an ancient one, and that the rights of the parties depended not upon an express grant, but upon a grant to be presumed from long user. Some agreement, from the mere enjoyment of the protection which the embankment gave, was presumed. The enjoyment of the servitude was of right, but not adverse, in the sense that a cause of action was given to the proprietor from whose land it was due. Now, if we suppose that in this case the effect of the embankment was to turn the course of a stream from the land of the party claiming the servitude, for the benefit of the owner of the land on which it was made, reciprocal servitudes would have been created, and the doctrine of the case supposed would have been consistent with the principle that a grant may be presumed, in certain cases, from the mere enjoyment of rights, from their continued exercise, without giving a right of action. But if we suppose the owner of the land to have derived no advantage from the embankment on his land, but that he has assumed the onerous duty of protecting the adjoining land from floods, the case stated is stronger. An agreement for a sufficient (pecuniary) consideration is presumed merely from the long-continued enjoyment of the protection in favor of the party claiming the right. The grant is then presumed from the long submission of the proprietor to a

burdensome charge. The servitude in that case is not reciprocal, but the benefit is all on one side. When a mutual advantage is derived from the exercise of a servitude, a consideration for the agreement presumed in the case is shown. If a servitude may be presumed, from the protection of adjoining land from an overflow, against the owner of land who erects a work for his own advantage, without trenching upon his neighbor's land, the presumption in its favor is much stronger when the maintenance of the work imposes a continued charge upon land to which this same charge yields an advantage. The obligation is then reciprocal, and one servitude is a consideration for the other. A qualified right is gained by the party who exercises such a servitude during the time of prescription. A person who, by the erection of an embankment on his own land, diverts the course of a stream from its natural bed, during the time of prescription, acquires the right indeed to the stream in its new course, but he acquires the right subject to the duty of maintaining the embankment. The proprietor who acquires the right to the stream in its new course, imposes by the same act the duty of receiving the flow of the water upon his own land. He is not justified in destroying the work, and if it has been carried away by a flood, the owner of the land in favor of which the right exists may enter and reconstruct it.

It appears, from a passage in the Digest,[1] and the Commentary of J. Voet, that when the effect of a building on the land of one person has been to introduce a favorable light by reverberation into the apartments of a neighboring house, the duty of maintaining such house may become a charge upon *its proprietor for the advantage of his neighbor*. The duty of maintaining the structure is imposed upon the owner of the house for the benefit of his neighbors, and then, says Voet, as in the case of the servitude *oneris ferendi*, he is compelled to perform an act upon his own land contrary to the ordinary nature of a servitude. After explaining in what sense the servitude license *alteris tollere* is to be under-

[1] Interdum dici potest, eum quoque, qui tollit ædificium, vel deprimit, luminibus officere: si forte κατὰ ἀνταυάκλασιν, id est, *per refractionem, seu repercussionem*, vel pressura quadam lumen in eas ædes devolvatur. D. 8, 2, 17, 2.

stood, he says that, besides that, there is another servitude by which a person is compelled upon his own premises to maintain a structure at a certain height, whether this is done for the light, or for the sake of a grateful shade to his neighbor, or to turn away the wind and cold from his premises. It is evident that Ulpian, in the passage cited from the Digest, had in view a case where the right was claimed, not in virtue of an express grant, but as resulting from long-continued enjoyment. In this instance, the prescriptive right was not founded upon an adverse user. The party who had acquired against his neighbor the servitude which required him to perform something on his own land, not merely to submit to the performance of acts, had enjoyed the privilege claimed under circumstances which raised indeed the presumption of a right, but in the legitimate exercise of his own right of property, and therefore not adversely.

In a case decided by the Supreme Court of Vermont (1 Williams' Reports 265), it was held that if the owner of land through which a stream runs changes the course of the stream on his own land, to the prejudice of other proprietors above or below, he acquires the right to continue the stream in the new channel after the time of limitation. But if the diversion affects other proprietors favorably, and the party on whose land the diversion is made acquiesced in the stream running in the new channel, for so long a time, that new rights may be presumed to have accrued, or have in fact accrued, in faith of the new state of the stream, the party is bound by such acquiescence, and cannot return the stream to its former channel. This case is, in principle, perfectly analogous to that of the embankment cited above from the Digest; the party, by embankment or other means on his own land, has prevented the land of an adjoining proprietor from being overflowed, and the right to have the diversion continued by such means is a servitude. After the time of limitation, the proprietor who has diverted the stream acquires the right to its continued flow in the new channel, and a right has been gained at the same time by the owner of the land where it flowed before, to be protected by means of the embankment by which the stream was diverted. Here is an in-

stance of reciprocal servitudes which rest upon the footing of a mutual agreement, and an agreement which is presumed on one side without an adverse possession. The proprietor from whose land the stream was diverted, acquired a right to have the embankment maintained without any adverse user by which a cause of action was furnished to the proprietor of the tenement on which the servitude was. An agreement was presumed on other grounds than an adverse possession. The Court were of opinion that the principle which governed the case was analogous to the rules of law which have been applied to dedications of land to public use. Ordinarily, when land is dedicated to public uses, there is an adverse user; but cases of dedication are decided upon the ground of a presumed agreement, which takes effect at the time of the supposed dedication, and does not depend for its efficacy upon the lapse of time. The principle on which reciprocal servitudes rest has, however, a greater analogy to the rules established for executed licenses. The gain on one side corresponds with the gain and the consequent obligations on the other. As in the instance of an executed license, the party who has diverted a stream has authorized another to act upon the assumption of a new state of rights. When the proprietor of land diverts the course of a stream from his neighbor's land, he does not acquire a right to the continued flow of the water, until after the time of limitation has passed; but the reciprocal servitude which the neighboring proprietor gains may, at his election, take effect immediately. If the embankment by which the course of the stream is changed is destroyed by a flood, soon after the change of the condition of the property, he may require it to be restored, or that he shall be permitted to restore, if he has acted upon the changed condition of things, by building or otherwise. There is an agreement on the part of the owner who makes the diversion, to permit the stream to flow in its new course. As in other cases of license, the agreement may be shown by parol, and it is implied from the act of the party himself. It is no objection, therefore, that the enjoyment is not adverse. It is adverse in the sense that it is of right. It is not on the footing of a wrongful possession that the right is

acquired, but on an agreement inferred from the acts of the parties, as in cases of license and dedication, and which binds them upon equitable considerations. The question whether a reciprocal servitude may be implied in favor of land subjected to a servitude, has arisen in the English Courts, and is placed upon the true ground, in a case decided by the Court of Exchequer: *Greatrex* vs. *Hayward*, 8 Excheq. Rep. 292. "The right of the party," said PARKE, B., "to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created." In that case, the plaintiff, who had received the flow of water from a drain made artificially for agricultural purposes, for more than twenty years, from the land of the defendant, who was an adjoining proprietor, brought an action against the latter for diverting the water by alterations made in the drainage of his close. The Court held that the watercourse was of a temporary nature only, and dependent upon the mode which the defendant might adopt in draining his land. In truth, the right claimed in this case was not the proper subject-matter of a servitude. It depended upon the course of cultivation and upon the acts of men, and was not capable, like a natural stream of water, of constituting a perpetual servitude. It was, in this respect, not more permanent in its character than the case supposed by ALDERSON, B., of a farmer who, under the old system of farming, has allowed the liquid manure from his fold-yard to run into a pit in his neighbor's field, but, upon finding that the manure can be beneficially applied to his own land, has stopped the flow of it into his neighbor's pit, and converted it to his own use; it could not be contended that the fact of his neighbor having used this manure for upwards of twenty years would give the latter the right of requiring its continuance. If, in this case, the question had related to the right of an adjoining proprietor to the continued flow of a stream which had been diverted from its natural course, after twenty years' enjoyment, it would have been held to be absolute; and yet, even in that case, though the flow of the water would have been enjoyed as of right, there would have been no adverse user. The right in such a case would depend upon license,

for, in availing himself of the user of the watercourse, the party, instead of subjecting himself to an action, would have done so by the consent of the owner from whose premises it was received. In an earlier case in the same Court, it was held that no action lay for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character, and when the interruption was by the party who stood in the situation of the grantor: *Arkwright* vs. *Gill*, 5 M. & W. 231.

In another case (*Wood* vs. *Waud*, 3 Exchcq. Rep. 748) it was held that the right to artificial watercourses, as against the party creating them, must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created; and the enjoyment for twenty years of a stream diverted or penned up by permanent embankment, stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to alteration. The flow of water for twenty years, it was said, from the eaves of a house, could not give a right to the neighbor to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain, for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbor so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances, in such cases, shows that one party never intended to give, nor the other to enjoy, the use of the stream, as a matter of right.

But the ground upon which the Court of Exchequer proceeded, assumed that a reciprocal servitude might be acquired in an unfailing watercourse, when the party from whose land it was discharged had, by such a discharge, gained the right to have the water flow in that manner. There is nothing, except an observation from ALDERSON, B., in *Greatrex* vs. *Hayward*, from which it can be

inferred that the circumstance that the enjoyment of the party claiming the reciprocal servitude is not adverse, in the sense that it furnished a right of action, would, in the opinion of the Court, prevent him from acquiring the servitude by an uninterrupted enjoyment for twenty years; but the character of the right claimed in the above cases, its temporary and uncertain value, is in each case put forward as distinguishing it from a case where, from the lasting character of the right, the reciprocal charge seems to be conceded to be equally permanent. And in another case decided by the Court of Queen's Bench (*Magor* vs. *Chadwick*, 11 Ad. & El. 571), it was held where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery through whose premises the water flowed for twenty years after the working had ceased, had, during that time, used it for brewing, that he thereby gained a right to the undisturbed enjoyment of the water, and that the mines could not afterwards be so worked as to pollute it. In this case the watercourse, though created artificially, had a perpetual source, and was therefore the proper subject of a servitude; and the doctrine of the case was, in effect, that whilst, by the flow of the stream, the owners of the mine were gaining the right to discharge the water upon the land of a neighbor, he was, at the same time, acquiring a right to have the flow of the water continued in its artificial bed. The decision seems to have been regarded as questionable, but merely upon the ground that the watercourse was an artificial one, and established for a temporary purpose; but it has never been doubted that the rule established in this case would have been properly applicable to a case where the cause of the servitude was perpetual. It is observable of this case, that although it was held that the owner of the servient tenement acquired a reciprocal servitude by his enjoyment of the water which was a charge upon the dominant land, there was no adverse enjoyment in the sense that he furnished a cause of action to the proprietor of the land from which the stream took its course. He merely exercised an incident of property in appropriating the water discharged upon his land, and yet by such user he acquired

the right to prevent persons claiming under the owners of the mine from polluting the water (in the ordinary course of their mining business). Consistently with the principles which govern this subject, the owner of the mine might have gained by long use the right to discharge its water upon the land of his neighbor, subject to the right concurrently acquired by him to require the water-course to be maintained. Viewed in this light, an adverse possession was only necessary on the part of the owner of the dominant tenement. In substance and effect, the right gained by the owner of the servient tenement was but a qualification of the principal right, and not such in its nature as to require an adverse possession.

On the whole, the true doctrine respecting the acquisition of reciprocal servitude by long-continued enjoyment appears to be that when the principal servitude has a perpetual cause, and the benefits and disadvantages have been simultaneously experienced by the owner of each tenement, an agreement may be presumed as a matter of fact by the triers, according to the circumstances of the case, that there has been a grant from the owner of each tenement to the other, giving a right to enjoy the privileges exercised as reciprocal and material charges upon the respective tenements.

S. F. D.

Supreme Court of Connecticut.

OPINION OF THE JUDGES in the matter of the constitutionality of the Act of the General Assembly, approved December 24th 1862, entitled "An Act in addition to an Act entitled an Act relating to electors and elections," providing a mode of taking the votes in the election of state and other officers, of persons absent from the state as volunteers in the military service of the United States.

The constitution of this State provides for the *time* of holding the annual election on the first Monday in May, in each year. And it also provides the *place*, viz., *in* an "electors' meeting" composed of the electors in the several towns, duly warned, convened, *organized* and *held* for *that purpose*.